Supreme Court, U.S.
FILED
APR 6 1992
OFFICE OF THE CLERK

91-1638

(1)

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

EDDIE EVANS,

PETITIONER,

VS.

THE CITY OF TULSA,
A MUNICIPALITY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

LEWIS BARBER, JR.
BARBER & MARSHALL, P.A.
1528 N.E. 23rd, Suite 410
OKLAHOMA CITY, OKLAHOMA 73111
(405) 424-5201

COUNSEL OF RECORD

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

EDDIE EVANS,

PETITIONER,

VS.

THE CITY OF TULSA,
A MUNICIPALITY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

QUESTIONS PRESENTED

1. Upon a 28 U.S.C. § 753(f) determination of "non frivolous" appeal, is it reversible error to deny an indigent, pro se litigant a transcript at government expense?

TABLE OF CONTENTS

	PAGE(S)
TABLE OF AUTHORITIES.....	iii, iv, v
OPINIONS BELOW.....	1
STATEMENT OF JURISDICTION.....	1
STATUTORY PROVISIONS.....	1
STATEMENT OF THE CASE.....	2
ARGUMENT AND AUTHORITIES.....	7
THE APPEALS COURT'S FAILURE TO PROVIDE EVANS WITH AN ADEQUATE MEANS OF PRESENTING IT WITH A FAIR BASIS FOR DETERMINING WHETHER THE DISTRICT COURT'S DENIAL OF A TRANSCRIPT WAS WAS WARRANTED WAS ERROR.....	15
ALL DOUBTS MUST BE RESOLVED IN FAVOR OF THE PRO SE APPELLANT..	16
EVANS SHOULD BE PROVIDED THE SAME ACCESS TO A TRANSCRIPT AS DEFENDANTS IN A CRIMINAL APPEAL.....	19
THE FINANCIAL STATUS OF THE TRIAL ATTORNEY MUST NOT BE CONSIDERED TO DETERMINE WHETHER THE APPEAL PRESENTS A SUBSTANTIAL QUESTION UNDER § 753.....	23
THE TRIAL LAWYER IS UNDER NO DUTY TO SECURE THE COSTS OF THE APPEAL.....	25

CONCLUSION AND PRAYER..... 27

CERTIFICATE OF SERVICE..... 29

AFFIDAVIT OF MAILING..... 30

APPENDIX A: Order dated January 3, 1991 from the United States District Court for the Northern District of Oklahoma denying Plaintiff's Motion for Judgment Notwithstanding the Verdict.

APPENDIX B: Order and Judgment of the United States Court of Appeals for the Tenth Circuit.

APPENDIX C: Financial Affidavit of Eddie Evans.

APPENDIX D: Motion for Leave to Proceed on Appeal In Forma Pauperis and Request for Transcript at the Expense of the United States.

APPENDIX E: Order granting motion to proceed in forma pauperis and denying request for transcript.

APPENDIX F: Motion for Leave to File Statement on the Evidence or Proceeding.

APPENDIX G: 28 U.S.C. § 753(f)

TABLE OF AUTHORITIES

PAGE(S)

SUPREME COURT CASES:

Adkins v. E.I. Du Pont De Nemours & Co.,
335 U.S. 331,
69 S.Ct. 85 (1948)..... 23, 25

Burns v. Ohio,
360 U.S. 252,
79 S.Ct. 1164 (1959)..... 20

Coppedge v. United States,
369 U.S. 438,
82 S.Ct. 917 (1962)..... 21, 22

Douglas v. California,
372 U.S. 353,
83 S.Ct. 814 (1963)..... 20

Draper v. Washington,
372 U.S. 367,
83 S.Ct. 774 (1963)..... 20

Hardy v. United States,
375 U.S. 277,
84 S.Ct. 424 (1964)..... 20, 21
22, 26

Johnson v. Avery,
393 U.S. 483,
89 S.Ct. 747 (1969)..... 20

Johnson v. United States,
352 U.S. 565,
77 S.Ct. 550 (1957)..... 17, 18
19

FEDERAL CIRCUIT CASES:

Lee v. Habib,
424 F.2d 891
(C.A. D.C. Cir 1970)..... 17

STATUTES:

28 U.S.C. § 753(f)..... 1, 9
14

28 United States Code § 1254..... 1

42 U.S.C. § 1981..... 2, 4

42 U.S.C. § 1983..... 2

CONSTITUTIONAL AMENDMENTS:

Fourteenth Amendment..... 19, 20

Fifth Amendment..... 3

First Amendment..... 3

FEDERAL RULES OF APELLATE PROCEDURE:

Rule 10 of the Federal Rules of
Appellate Procedure..... 7, 16

BOOKS AND PERIODICALS

Black's Law Dictionary,
Revised, 4th Ed., 1968..... 8, 10

OPINIONS BELOW

After a ten day trial, the jury found in favor of the City of Tulsa. Appeal was taken in the United States Court of Appeals for the Tenth Circuit; and, on January 7, 1992, the Appeals Court affirmed the jury verdict. The decision of the Appeals Court is contained herein as Appendix B.

STATEMENT OF JURISDICTION

The date of the judgment sought to be reviewed is January 7, 1992. The court from which relief is sought is the United States Court of Appeals for the Tenth Circuit. This Court has jurisdiction to review this case pursuant to 28 United States Code § 1254.

STATUTORY PROVISIONS

The statutory provisions upon which this case relies is 28 U.S.C. § 753(f),

and is set out in the Appendix to this petition.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance was 42 U.S.C. § 1981; and, 42 U.S.C. § 1983 and the 5th and 14th Amendments to the Constitution of the United States.

Petitioner, Eddie Evans, Appellant below, Plaintiff at trial, (hereinafter referred to as "Evans") was employed by the City of Tulsa, Oklahoma (hereinafter referred to as "City").

On July 28, 1988, Evans filed his original Complaint in the Northern District of Oklahoma and alleged race discrimination. On November 26, 1990 the matter came on for jury trial and the jury entered judgment in favor of Defendant-Appellee on all counts.

Appellant moved for judgment n.o.v. on December 17, 1990; and, same was denied by the trial court on January 8, 1991.

At trial, Evans contended, inter alia, (1) that he had been terminated by the City because he talked to the press concerning the discrimination in the City, in violation of his First Amendment right to free speech; (2) that he had been terminated for reasons which the City failed to give him notice and the opportunity to respond, in violation of the Fifth Amendment guarantee of due process; and, (3) that the City had attempted to prevent him from filing a lawsuit for civil rights violations and terminated him because he filed his civil rights lawsuit; in violation of the right to access a judicial forum in which to address his grievances, in violation of

42 U.S.C. § 1981.

During trial, the City admitted that it did terminate Evans because he talked to the press; that it did terminate Evans without giving him an opportunity to respond to the charges which were the basis of the termination; and that he was terminated because he did in fact file a civil rights lawsuit. Because of the gravity of those admissions, Evans' counsel caused a partial transcript of that testimony to be prepared during the pendency of the trial in order to use the same during closing argument. Also during the trial, the City admitted that it did not preserve a record of the termination proceedings, in violation of a City ordinance and a State law which guaranteed Evans the right to appeal from the termination.

After deliberating for more than three hours, the jury submitted the following interrogatory to the court: "Are we to decide this case on Racial Discrimination alone?" In response, and over the objection of Evans, the trial court answered thusly: "Racial discrimination is asserted as an element of each of plaintiff's claims." Thereafter, within 20 minutes; the jury found in favor of the City of Tulsa on all claims.

On February 26, 1991 Evans filed a motion to proceed in forma pauperis, alleged that the transcript was necessary to prosecute the appeal; and, requested a copy of the trial transcript, costs to be borne by the United States.[1] On July 19,

---

1 During the first day of Dowd's testimony, he made certain admissions and certain declarations against interest

1991, the trial court granted Appellant's request to proceed in forma pauperis but denied his request for a transcript at United States expense, holding that the case did not present a substantial question for review. Thereafter Evans filed his opening brief; and, although, in its response brief, the City admitted that it did ratify the actions of its agents and that it would be liable for the alleged wrongful acts, the City moved for dismissal on the basis that Evans failed to include a transcript of the trial for review by the Appeals Court. (See Appendix B, p. 4-5). Evans then

---

which, alone, were sufficient to allow the court to direct a verdict in Evans' favor. Because of the nature of those admissions, Evans' counsel requested the court reporter to prepare a transcript of Dowd's testimony which was done and utilized by counsel in closing argument.

reurged his position that his case was meritorious and moved the Appeals Court for leave to file a Statement on the Evidence or Proceedings pursuant to Rule 10 of the Federal Rules of Appellate Procedure. The Court of Appeals for the Tenth Circuit denied Evans' motion and affirmed the decision of the jury on the basis that Evans failed to provide a transcript for review.

ARGUMENT AND AUTHORITIES

Petitioner seeks review of this case because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Appeals Court acknowledged that the district court found Evans qualified for in forma pauperis status and that his

appeal was not frivolous and under the provisions of 28 U.S.C. Section 753(f) that was all that was that was required to have a transcript provided at the U.S. governments expense--period.

The Appeals Court attempts to side step the clear and unambiguous language of the subject statute by noting that the trial court found "no substantial question" a dichotomous absurdity to say the least. "...Not frivolous" is the compelling objective determination upon which government funds can be used to pay for a transcript in an in forma pauperis, civil action. Black's Law Dictionary, Revised, 4th Ed., 1968, defines the use of the word "frivolous" as:

> ...Any pleading is called 'frivolous' when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably

> interposed for mere purposes of delay or to embarrass the opponent."
>
> A "frivolous appeal" is one presenting no justiciable question and so readily recognizable as devoid of merit on face of record that there is little prospect that it can ever succeed."
>
> Emphasis Ours.

Since the trial court found the appeal "not to be frivolous", then as a matter of sound logical deduction, a reasonable jurist is compelled to assume that the trial court found at least one "justiciable question."

Yet, the Court of Appeals speculates and attempts to halve the language in 28 U.S.C. § 753(f) by emphasizing the parenthetical language, "but presents a substantial question," as being mutually exclusive or independent of the principle or recitationary language, "Fees for transcripts furnished in other

proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous..." By shear legal definition (Black's Law Dictionary, supra) you cannot have a "non frivolous appeal" that does not present a "substantial question" --- it is improbable if not impossible.

On the other hand, let us assume, arguendo, that the learned jurists in the Courts below are correct in their finding that a non frivolous appeal does not present a "substantial question." Is an indigent, pro se appellant not entitled to be informed of the basis of the "non frivolous" findings by the court if his case has merit, and the trial court so found, then was he not entitled to know

the base question of law upon which this merit rests? Or, do we just say that your case is "non frivolous" without making any findings going to the absence of the "substantial question." What has been done in the case at bar is the appellate court has gone outside the record to extract inferences to support its dichotomy in giving effect to its finding of "no substantial question." The court surmises that because counsel did not stick with the case that the case was not worthy. (Opinion 13) Also the appellate court makes reference to certain partial submissions of the transcript as being sketchy, (Opinion 7), when the testimony offered by the partial transcript is the examination of the City's Chief Executive Officer (CEO) and declarations were made that support

petitioner's claim of being deprived of certain enumerated constitutional rights --- "substantial questions." "Substantial questions" appear on the face of the limited pleadings filed with the appellate court. Instead of treating this indigent appellant's questions in a customary manner by giving him favorable consideration on matters that can be inferred from the face of the record; or, by adopting those standards of review similar to motions for default judgments and summary judgments, so as to conclude that no question of fact exists so as to prevent a decision as a matter of law, the court below adopted the reverse --- it subjected all inferences in favor of the petitioner, the non moving party, a different standard of consideration.

The Court of Appeals does not deny that a "substantial question" was not raised, but it denies that the proof is absent because of the transcript, which was the basis of petitioner's appeal to both the trial court and the appellate court --- he knew he needed a transcript to prove his case. The appellate court on the one hand says that it could make a decision, probably in favor of petitioner if it had a transcript. And, the appellate court alludes to the petitioner's plight of making $700.00 per month with the Salvation Army and not being able to afford a $5,000.00 transcript. (Opinion 10). In essence the appellate court's decision sends a message to the poor litigant and to the lawyers who are unable to finance lawsuits for the poor. This message runs

counter to the spirit and intent of all Civil Rights Acts and statutes. Petitioner is qualified under § 753(f) and demands an equal application of law.

In the case at bar, the Court of Appeals stated that the transcript was "absolutely essential" to review of plaintiffs claims. The Appeals Court then questioned whether the district court abused its discretion by denying plaintiff a transcript at government expense when it held that Evans did not present a "substantial question" as required by 28 U.S.C. § 753(f). (Decision, p. 10-11). With circular logic, the Appeals Court also noted that the it could not address whether the district court improperly found that the appeal did not involve a substantial question because the complete record was

not before the it. (Decision, p. 11).

Under Section 753(f) it was not necessary for the Appeals Court to have the complete record before it to decide whether Evans' appeal presented a "substantial question" for as a mater of reasonable deduction it is not possible for an appeal to be "frivolous" yet still present a "substantial question."

THE APPEALS COURT'S FAILURE TO PROVIDE EVANS WITH AN ADEQUATE MEANS OF PRESENTING IT WITH A FAIR BASIS FOR DETERMINING WHETHER THE DISTRICT COURT'S DENIAL OF A TRANSCRIPT WAS WARRANTED WAS ERROR

28 U.S.C. § 753 (f) provides that an appellant may proceed forma pauperis and that will be entitled to a transcript of the proceedings if the district judge certifies that the appeal is not frivolous and that it presents a substantial question. The district court found that the appeal was not frivolous

and granted Evans the right to proceed with his appeal in forma pauperis; however, it stated that Evans did not present a substantial question; and denied his request for a transcript of the trial at government expense. Evans then moved the Appeal Court for leave to file a statement of evidence pursuant to Rule 10 of the Federal Rules of Appellate Procedure. Evans contends that the denial of the transcript by the district court and the Appeals Court was a gross abuse of judicial discretion and must be reviewed by this Court.

ALL DOUBTS MUST BE RESOLVED IN FAVOR OF THE PRO SE APPELLANT

The Appeals Court stated in numerous places throughout its decision that the transcript was essential for the review of this case (Appendix B, p. 6-9); however, the Appeals Court declined

to order the preparation of the transcript but engaged in a discussion whether the district court abused its discretion by not allowing Evans a transcript at government expense. (Appendix B, p. 10). Evans submits that after he challenged the denial of the transcript in his November, 1991, motion for leave to file statement of evidence, the Appeals Court had a duty under Johnson v. United States, 352 U.S. 565, 77 S.Ct. 550 (1957) to displace the district court's denial of transcript and order a transcript at government expense. Moreover, any doubts concerning the substantiality of question on appeal must be resolved in favor of the indigent appellant. Lee v. Habib, 424 F.2d 891 (C.A. D.C. Cir 1970).

Speaking to the district court's

denial of a petitioner to proceed in forma pauperis the Supreme Court held in Johnson:

> ...Such certification is not final in the sense that the convicted defendant is barred from showing that it was unwarranted and that an appeal should be allowed. Of course certification by the judge presiding at the trial carries great weight but, necessarily, it cannot be conclusive. Upon a proper showing a Court of Appeals has a duty to displace a District Court's certification... This does not require that in every such case the United States must furnish the defendant with a stenographic transcript of the trial. It is essential, however, that he be assured some appropriate means-such as the district judge's notes or an agreed statement by trial counsel-of making manifest the basis of his claim that the District Court committed error in certifying that the desired appeal was not pursued in good faith...
>
> [S]ince it does not appear that the Court of Appeals assured petitioner adequate means of presenting it with a fair basis for determining

> whether the District Court's certification was warranted, the judgment below must be vacated....

Johnson v. United States, 352 U.S. at 566, 77 S.Ct. at 551.

In the case at bar, even after the district court certified that the appeal did not present substantial questions, Evans took issue with the district court's assessment and contended that his appeal was meritorious; and, in fact, moved the Appeals Court to submit an agreed upon statement of the proceedings. The Appeals Court's refusal to do so was error under the rationale advanced in Johnson.

EVANS SHOULD BE PROVIDED THE SAME ACCESS TO A TRANSCRIPT AS DEFENDANTS IN A CRIMINAL APPEAL

It is well settled that it is invidious discrimination in violation of the Fourteenth Amendment to deny a

criminal defendant a copy of the transcript in a criminal appeal; and, it is equally well settled that there can be no equal justice where the kind of an appeal a man enjoys depends on the amount of money he has. Douglas v. California, 372 U.S. 353, 83 S.Ct. 814 (1963); Burns v. Ohio, 360 U.S. 252, 79 S.Ct. 1164 (1959); Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747 (1969); Draper v. Washington, 372 U.S. 367, 83 S.Ct. 774 (1963). Petitioner contends that as an indigent pro se civil appellant he is entitled to the same protection of the Fourteenth Amendment.

In Hardy v. United States, 375 U.S. 277, 84 S.Ct. 424 (1964) the Supreme Court determined that a transcript must be provided to the court appointed counsel of appellants who have been

allowed to proceed in forma pauperis under § 753. The Court held that the right to appeal was "illusory" if no transcript is available at least to one whose lawyer on appeal enters the case after the trial is ended." Hardy, 375 U.S. at 280, 84 S.Ct. at 427. Evans contends that the right to a transcript is even more vital to an appellant who is proceeding pro se. At a very minimum, the pro se appellant should be entitled to that portion of the transcript which is relevant to the points of error assigned. See Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917 (1962).

Evans contends that under the rationale set forth in Hardy, once the district court certified that the appeal was not frivolous, he was entitled to a transcript at government expense. In

Hardy, the Supreme Court held:

> We deal here only with the statutory scheme and do not reach a consideration of constitutional requirements. We see no escape from the conclusion that either where the requirements of a non frivolous appeal prescribed by Coppedge v. United States, supra, are met, or where such a showing is sought to be made, and where counsel on appeal was not counsel at the trial, the requirements placed on him by Ellis v. United States, supra, will often make it seem necessary to him to obtain an entire transcript.

Hardy v. United States, 375 U.S. at 282, 84 S.Ct. at 428.

Evans contends that the right of a pro se appellant to appeal in forma pauperis is "illusory" where no transcript is available for the reviewing Court to determine the existence of errors or defects which the pro se appellant has raised in his appeal.

THE FINANCIAL STATUS OF THE TRIAL

ATTORNEY MUST NOT BE CONSIDERED TO DETERMINE WHETHER THE APPEAL PRESENTS A SUBSTANTIAL QUESTION UNDER § 753

In deciding whether the appeal presented a "substantial question" the Appeals Court looked to the conduct of the trial lawyer stating:

> Here we must consider that plaintiff lost his case before a jury. His lawyer, who would be entitled to reasonable compensation paid by the defendant if the case was won, has bowed out, leaving plaintiff to act pro se. This is evidence of at least the attorney's lack of confidence in the merits of the appeal.

Evans contends that the Appeals Court statement is completely irresponsible, without merit, a complete display of abuse of judicial discretion and displays a complete insensitivity to the focus plight of an indigent appellant.

In Adkins v. E.I. Du Pont De Nemours & Co., 335 U.S. 331, 69 S.Ct. 85 (1948) a

petitioner's in forma pauperis appeal was denied in part because her attorney had not shown that they were unable on account of poverty to pay or give security for costs. The Supreme Court vacated the order denying appeal in forma pauperis holding:

> The same poverty that compels a litigant to avail himself of this beneficent statute makes it impossible for him to hire counsel. He can procure counsel only by agreeing that out of the proceeds of his case, if there are proceeds, counsel shall be compensated. *** In practical effect he [a poor litigant] is denied counsel if his counsel must either himself guarantee the costs or file an affidavit that he also is penniless. The statute was intended for the benefit of those too poor to pay or give security for costs, and it was not intended that they should be compelled to employ only paupers to represent them.
>
> It was error to deny petitioner's motion for appeal under the statute on the ground that her lawyers had not made

> satisfactory affidavits of poverty. The statute requires no affidavit at all from them as a condition of appeal.

Adkins, 355 U.S. at 343-44, 69 S.Ct. at 91. Thus, it was error for the Appeals Court to consider the financial position of Evans' former lawyer to determine whether Evans was entitled to a transcript of the trial or to determine whether the appeal presented a substantial question under § 753.

THE TRIAL LAWYER IS UNDER NO DUTY TO SECURE THE COSTS OF THE APPEAL

The "attorney lack of confidence" rationale which was espoused by the Appeals Court cannot be reconciled with the intent of the in forma pauperis provisions of § 753. Evans submits that the merits of his appeal should not have rested on the ability of his former lawyer to finance his case at the

appellate level.

In the Hardy concurrence the Supreme Court stated:

> ...It is not far from the truth to say that the federal system seeks to avoid the expenses of supplying transcripts to all financially disadvantaged defendants desiring to appeal by shifting the burdens to lawyers required to serve without compensation or reimbursement of expenses.
>
> ...[T]he interests of equal justice and the viability of our adversary system are impaired when an indigent defendant's access to a trial transcript is no as complete as that of a paying defendant. This "concept of 'equal justice' does not confuse equality of treatment with identity of treatment." It does, however, require the Government to do "all that can reasonably be required of it to eliminate those factors that inhibit the proper and effective assertion" of the defendant's claims.

Hardy v. United States, 375 U.S. at 290-91, 84 S.Ct. at 432.

The proper focus in an in forma

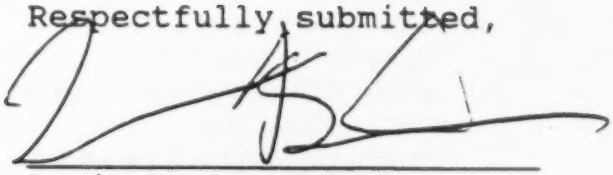
pauperis, pro se appeal is the financial ability of the appellant and the substantial nature of the issues presented for review.

CONCLUSION AND PRAYER

Wherefore, premises considered, Appellant prays this court grant certiorari of this matter, vacate the decision of the Court of Appeals, order the Appeals Court to prepare a transcript of the trial at the expense of the government and remand this case to the Court of Appeals with directions to

reconsider its decision in light of the trial transcript.

Respectfully submitted,

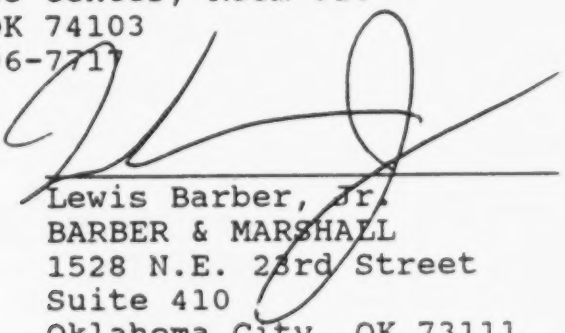


Lewis Barber, Jr.
BARBER & MARSHALL
1528 N.E. 23rd Street
Suite 410
Oklahoma City, OK 73111
(405) 424-5201

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of April, 1992, a true and correct copy of the above and foregoing Petition for Writ of Certiorari was mailed, postage prepaid, to the following:

Charles R. Fisher
Assistant City Attorney
200 Civic Center, Room 316
Tulsa, OK 74103
(918) 596-7717



Lewis Barber, Jr.
BARBER & MARSHALL
1528 N.E. 23rd Street
Suite 410
Oklahoma City, OK 73111
(405) 424-5201

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

EDDIE EVANS,

PETITIONER,

VS.

THE CITY OF TULSA,
A MUNICIPALITY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AFFIDAVIT OF MAILING

The Petition For Writ of Certiorari was mailed, first class postage prepaid and correctly addressed to the Clerk of the Supreme Court of the United States,

on the 6th day of April, 1992 from the Main Post Office, 320 S.W. 5th Street, Oklahoma City, Oklahoma 73109.

Lewis Barber, Jr.
BARBER & MARSHALL
1528 N.E. 23rd Street
Suite 410
Oklahoma City, OK 73111
(405) 424-5201

STATE OF OKLAHOMA)
) ss.
COUNTY OF OKLAHOMA)

Subscribed and sworn to before me this 6th day of April 1992,

Notary Public

My Commission Expires:
October 15, 1994

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EDDIE EVANS,	)	
	)	
Plaintiff,	)	
	)	No. 88-C-711-VS
	)	
CITY OF TULSA, a municipality,	)	
	)	
	)	
Defendant.	)	

ORDER

A jury verdict having been received in the above entitled case on December 6, 1990, and on December 17, 1990 the Plaintiff, Eddie Evans, having moved this Court for Judgment Notwithstanding the Verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure, and on January 2, 1991 the Defendant, City of Tulsa, having responded to Plaintiff's motion, and this Court having carefully reviewed the points raised on the Motion for Judgment Notwithstanding the Verdict, and having determined that the motion

must be denied:

IT IS ORDERED that the Plaintiff's Motion for Judgment Notwithstanding the Verdict is denied.

Dated this 3rd day of January, 1991.

/s/
Bruce M. Van Sickle
United States District Judge

APPENDIX "B"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

EDDIE EVANS,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 91-501-
v.	)	(D.C. No.
	)	88-C-711-VS)
	)	(N.D. Okla.)
	)	
CITY OF TULSA, a municipality,	)	
	)	
Defendant-Appellee,	)	
	)	
PAUL PAYNE, jointly and individually,	)	
	)	
Defendant.	)	

ORDER AND JUDGMENT*[1]

Before LOGAN, MOORE and BALDOCK, Circuit Judges.

---

[1] This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff Eddie Evans brought this action against the City of Tulsa alleging that in terminating his employment the city discriminated against him on the basis of race and for exercise of his First Amendment rights, in violation of 42 U.S.C. §§ 1981 and 1983. He also asserted pendent state court claims. The action was tried to a jury in what was a nine or ten day trial, with the jury rendering a verdict in favor of the city on all claims. When his motion for

judgment notwithstanding the verdict was denied, plaintiff took the instant appeal.

On appeal plaintiff argues that he is entitled to reversal of the judgment on the basis of the following claims

1. He was denied due process by the city's forty-five day suspension without giving him the opportunity to respond to the allegations against him;

2. The city unlawfully interfered with his right of access to the judicial process;

3. The city violated his First Amendment right to free speech;

4. The court erred when it allowed defendant Payne's counsel to participate in the trial after plaintiff dismissed Payne from the suit;

5. The city demonstrated

deliberate indifference to plaintiff's right to appeal his termination to a court of law

6. The court erred when it failed to allow plaintiff to introduce expert testimony of the city's historical discrimination against its black supervisory employees;

7. The court erroneously instructed the jury that racial discrimination was an element of each of plaintiff's claims; and

8. The court erred when it failed to disqualify the firm of Hall, Estill, Harkwick, Gable, Golden & Nelson from participation in the case.[2]

---

[2] Additionally, plaintiff asserts that the city is responsible for its adoption of the decisions and recommendations of city employees Dowd and Payne. The city admits that it did ratify Dowd and Payne's actions, and that if these employees violated plaintiff's

The city argues that we cannot overturn the district court's judgment because each alleged error requires analysis of the transcript of the trial and the court's rulings and instructions, and plaintiff has not provided any such transcripts. See McEwen v. City of Norman, Okla., 926 F.2d 1539, 1550 (10th Cir. 1991) ("when an appeal is based upon a challenge to any ruling or order, a copy of pages of the reporter's transcript at which the ruling or order and any necessary objection are recorded must be included"); Southwest Forest Indus., Inc. v. Sutton, 868 F.2d 352, 356 (10th Cir. 1989) (alleged improper jury instructions cannot be reviewed if

---

constitutional rights the city should be held liable. But the city relies upon the jury verdict in its favor after trial.

instructions are not in the record), cert. denied, 110 S.Ct. 1320 (1990) Neu v. Grant, 548 F.2d 281, 286 (10th Cir. 1977) ("Matters not appearing in the record will not be considered by the court of appeals.").

Tenth Circuit Rule 10.2.3 states as follows:

> Required Transcript. When an appeal is based upon a challenge to the admission or exclusion of evidence, the giving or failure to give a jury instruction, or any other ruling or order, a copy of the pages of the reporter's transcript at which the evidence, offer of proof, instruction, ruling, or order and any necessary objection are recorded must be included.

Plaintiff, who is proceeding pro se, says he cannot afford to pay for a trial transcript. He made a motion in the district court for a free transcript, which the court denied. Plaintiff

apparently ordered a partial transcript, as he attached to his brief a forty-eight page transcript of the direct examination of witness Joseph Michael Dowd.

We have examined carefully the appellate record that was provided to us, consisting of the complaint, motions filed in district court, briefs in support of those motions, a pretrial order and an amended pretrial order, and rulings by the court. We have also examined carefully the partial transcript attached to plaintiff's brief. This record contains no jury instructions and absolutely nothing that would permit us to evaluate any of the arguments made by plaintiff in his appellate brief.

The record contains nothing with respect to the city's suspension of plaintiff except the city's allegation

that the suspension was with pay and that Evans was given a full hearing before his termination. There is some assertion that hearsay remarks concerning threats made by plaintiff after he received unsatisfactory ratings were a reason for his suspension.

There is nothing in the record with respect to plaintiff's claim of interference with his access to the judicial process, except a fragment in the direct examination of Dowd plaintiff included with his brief. Without the cross-examination or the rest of the record this contention cannot be evaluated. The same is true of the argument of interference with plaintiff's First Amendment rights, which apparently arises out of interviews plaintiff gave to the press or television. There is

absolutely nothing in the record before us concerning the court's allowing counsel of a dismissed defendant to participate in the trial after that dismissal, or the alleged destruction of tapes of the civil service proceedings which plaintiff argues demonstrated deliberate indifference to his right to appeal his termination.

The trial transcript would be absolutely essential to evaluate the trial court's determination not to allow plaintiff's expert to testify. A copy of the transcript and the instructions, not in the record, would be essential to evaluating the alleged error in instructions. There is nothing in the record concerning the court's failure to disqualify a law firm.

Without the trial transcript or more

record than was provided us, we are required to affirm the judgment of the district court. See Neu v. Grant, 548 F.2d 281 (10th Cir. 1977).

What this brings us down to is the question whether the district court abused its discretion in denying plaintiff a transcript at government expense. Plaintiff says the estimated cost for a transcript is $5,000 and he could not afford it on his $700 per month pay from the Salvation Army. In civil litigation a plaintiff is not entitled to a transcript as a matter of right. 28 U.S.C. § 753(f) states, in pertinent part: "Fees for transcripts furnished in [noncriminal, non-habeas corpus and non-section 2255] proceedings to persons permitted to appeal in forma pauperis shall . . . be paid by the United States

if the trial judge or circuit judge certifies that the appeal is not frivolous (but presents a substantial question)." The district court allowed plaintiff to proceed in forma pauperis and certified the appeal as not frivolous, but found that the appeal did not involve a substantial question. I R. tab 111. It is difficult for us to determine whether the district court improperly found that the appeal did not involve a substantial question. "The problem is that in many cases it will be difficult for the court to determine whether substantial questions are presented unless the complete record is available." Rhodes v. Corps of Engineers of United States Army, 589 F.2d 358, 359 (8th Cir. 1978). The irony of the situation is apparent; as Judge Learned

Hand stated, "We are of course aware that a thorough decision whether there was a substantial question would depend upon a scrutiny of the whole record; so that, speaking literally, we could not adequately decide the motion until after we had granted it." Jaffe v. United States, 246 F.2d 760, 762 (2d Cir. 1957) (Hand, J.). Clearly, however, § 753(f) was not intended to require free transcripts for all civil litigants proceeding in forma pauperis who argue a sufficiency of the evidence issue or factual issues on appeal. "Plainly, therefore, we must proceed upon what the motion papers contain." Jaffe, 246 F.2d at 762.

The record and briefs in the instant case do not on the whole provide us with enough information to find "substantial

questions" are presented. Lower courts have defined 'substantial question' to mean a significant issue that is "unique or unusual" or "reasonably debatable." Armstrong v. Ashbury, 57 F.R.D. 139, 140 (W.D. Pa. 1972); see also Handley v. Union Carbide Corp., 622 F. Supp. 1065, 1067 (S.D.W. Va. 1985) (reasonably debatable), aff'd on other grounds, 804 F.2d 265 (4th Cir. 1986); Linden v. Harper & Row, Inc., 467 F. Supp. 556, 558 (S.D.N.Y. 1979) (reasonably debatable); Ortiz v. Greyhound Corp., 192 F. Supp. 903, 905 (D. Md. 1959) (reasonably debatable). Here we must consider that plaintiff lost his case before a jury. His lawyer, who would be entitled to reasonable compensation paid by the defendant if the case was won, has bowed out, leaving plaintiff to act pro se.

This is evidence of at least the attorney's lack of confidence in the merits of the appeal. From the fragments of record we do have nothing jumps out at us as an obviously meritorious claim which would warrant reversal for a new trial. We cannot say that the issues raised on appeal are unique nor can we find on the record before us that the district court's refusal to certify the appeal as involving substantial questions is erroneous.

Plaintiff has made a motion before us for leave to file a statement on the evidence or proceedings pursuant to Fed. R. App. P. 10. The motion is opposed by defendant on the ground that a year after the trial it would be impossible, without a transcript, to reconstruct a statement of the evidence of a nine day trial. We

agree, reinforced by having compared the statements in plaintiff's pro se brief concerning the testimony of the one witness whose transcript he attaches to his brief. Therefore, we deny plaintiff's motion to file the statement of evidence of the proceeding.

AFFIRMED.

The mandate shall issue forthwith.

Entered for the Court

James K. Logan
Circuit Judge

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

EDDIE EVANS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 88-C-711-B
	)	
CITY OF TULSA, a municipality,	)	
	)	
Defendant.	)	

FINANCIAL AFFIDAVIT

I, EDDIE EVANS, being first duly sworn, depose and say that I am the Appellant in the above entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor; that believe I am entitled to redress; and the issues which I desire to present on appeal are the following:

A. Whether the court erred when it failed to disqualify Patrick Cremin, Judith Colbert and HALL, ESTILL, et al., when Evans showed that he had initially contacted the firm of HALL, ESTILL, et al. to represent him and showed proof of that contact.

B. Whether the court erred when it allowed Judith Colbert, a black attorney, of HALL, ESTILL, et al., to participate in the trial when plaintiff dismissed Paul Payne, who was represented by HALL, ESTILL, et al.

C. Whether the court erred when it failed to direct a verdict in plaintiff's favor on his § 1981 claim, when the City admitted that it fired plaintiff because he filed a civil rights lawsuit and the decision was ratified by the Civil Service Commission.

D. Whether the court erred when it failed to direct a verdict in plaintiff's favor on his First Amendment right claim when the City admitted that it fired plaintiff because he spoke to the press about his termination and said decision was ratified by the Civil Service Commission.

E. Whether the court erred when it failed to direct a verdict in plaintiff's favor on his § 1983 claim when the Chairman of the Civil Service Commission admitted that it failed to preserve records of plaintiffs Civil Service proceedings in order that plaintiff could appeal the decision to the District Court of Oklahoma.

F. Whether the City's failure to keep records until such time until the period of appeal has elapsed constituted deliberate indifference sufficient to constitute a violation of § 1983.

G. Whether the court erred when it refused to allow testimony of the City's historical discrimination of its black employees, and it black supervisors in particular, as proof of intent in plaintiff's § 1981 claim

H. Whether the court erred when it instructed the jury that race was an element of each of plaintiff's claims, including plaintiff's First Amendment claim, his due process claim, his § 1983 claim, and interference with plaintiff's right to judicial

process.

I. Whether the court erred when it failed to direct a verdict in plaintiff's favor on his due process claim when the City admitted that it took disciplinary action against plaintiff without first notifying plaintiff of the reasons for those actions.

J. Whether the court erred when it failed to direct a verdict in plaintiff's favor on his due process claim when the City confronted plaintiff with charges of misconduct and did not give plaintiff the opportunity to respond to charges which resulted in disciplinary action against him.

K. Whether the cumulative errors by the court were sufficient to warrant a mistrial.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1. Are you presently employed? Yes.

a. $700.00 per month gross, $640.00 net pay. Salvation Army, 1231 N. Harvard, Tulsa, OK 74115.

2. Have you received within the past twelve months any income from business, profession or other form of self-employment, or in the form of rent paymenst, interest, dividends, or other source? No.

3. Do you own any cash or checking or savings account? Yes.

a. Total in checking account- $400.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes.

a. Stock - Central and Southeast, 9 shares, approximate value $400.00. Do not receive dividends.

5. List the persons who are dependent upon you for support and list your relationship to those persons.

Edward P. Evans - My Son
Robbin R. Evans - My Daughter
Donna L. Evans - My Wife

I understand that a false statement or answer to any questions in the affidavit will subject me to penalties

for perjury.

_____
EDDIE EVANS

IT IS ORDERED THAT THE APPLICANT PROCEED WITHOUT PREPAYMENT OF FEES OR COSTS OR THE NECESSITY OF GIVING SECURITY THEREFOR.

_____
U.S. DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of July, 1991, a true and correct copy of the above and foregoing Financial Affidavit was mailed, postage prepaid, to the following:

Judith A. Colbert
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, OK 74172-0154
(918) 588-2883

_____
Eddie Evans, Appellant Pro Se

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

EDDIE EVANS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 88-C-711-B
	)	
CITY OF TULSA, a municipality, and PAUL PAYNE, Jointly and Individually,	)	
	)	
Defendants.	)	

MOTION FOR LEAVE TO PROCEED ON APPEAL IN FORMA PAUPERIS AND REQUEST FOR TRANSCRIPT AT THE EXPENSE OF THE UNITED STATES

COMES NOW, Plaintiff, Eddie Evans, pursuant to Rule 6 of the Local Rules, Rule 24.1 of the Rules of the United States Court of Appeals for the Tenth Circuit and 28 U.S.C. § 753 and moves the Court to allow him to proceed on appeal in forma pauperis. In support thereof, Evans respectfully shows the Court as follows:

1. At the trial in this matter, the Defendant made admissions which should have entitled Plaintiff to a directed verdict at trial and Plaintiff is confident that the decision will be reversed by the Tenth Circuit.

2. Because of unanticipated delays, the trial which was originally scheduled to last for 3 or 4 days lasted 10 days.

3. That because of the length of the trial, the transcript of the proceedings is expected to cost more than $5,000.00.

4. That Plaintiff has not been able to secure a second mortgage on his home to finance the appeal.

5. Plaintiff has been unable to retain an attorney to represent him in this appeal; that he is prosecuting the

appeal pro se and that the transcript of the proceedings is necessary to prosecute this appeal.

6. That the appeal is not frivolous and the transcript is needed to decide the issues presented by the appeal.

WHEREFORE, Plaintiff respectfully moves the Court to grant him leave to proceed in forma pauperis and to provide him with a transcript of the proceedings at the expense of the United States.

Respectfully submitted,

/s/
EDDIE EVANS, Plaintiff
Pro Se
1155 North Xenophon
Tulsa, Oklahoma 74127
(918) 585-1477

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of February, 1991, a true and correct

copy of the foregoing Motion was mailed, postage prepaid, to the following:

Judith A. Colbert
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, OK 74172-0154
(918) 588-2883

/s/_____
Eddie Evans, Plaintiff Pro Se

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

EDDIE EVANS, Plaintiff, v. CITY OF TULSA, a municipality, Defendant.	)	No. 88-C-711-B

ORDER

After a jury verdict in favor of defendant, plaintiff Eddie Evans has brought this motion for leave to proceed in forma pauperis on appeal. Mr. Evans also seeks to have furnished to him transcripts of his trial. After reviewing information contained in Mr. Evans' affidavit supporting his motion, the Court finds that the appeal is taken in good faith and certifies that the appeal is not frivolous. However, the Court does not find that the appeal

presents such a substantial question as to warrant the furnishing of a trial transcript to plaintiff. See 28 U.S.C. § 753(f); Fed. R. App. P. 24; 10th Cir. R. 24.

THEREFORE, IT IS ORDERED:

THAT PLAINTIFF'S MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS IS GRANTED; PLAINTIFF'S REQUEST TO BE FURNISHED WITH TRIAL TRANSCRIPTS IS DENIED.

Signed at Bismarck, North Dakota this 16th day of July, 1991.

/s/
Bruce M. Van Sickle, Judge
United States District Court

APPENDIX "F"
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EDDIE EVANS,

Appellant,

v. No. 91-5019

CITY OF TULSA,

Appellee.

MOTION FOR LEAVE TO FILE STATEMENT ON THE EVIDENCE OR PROCEEDING

COMES NOW EDDIE EVANS, Appellant pro se, and requests the Court for leave to file a Statement on the Evidence or Proceedings pursuant to Rule 10 Fed.R.App.P. In support thereof Appellant respectfully shows the Court as follows:

1. Appellant moved the Trial Court for permission to proceed in forma pauperis and requested that the District Court allow him to obtain a transcript at

the expense of the United States. Appellant informed the Trial Court that he was not financially able to secure the trial transcript but that same was necessary to prosecute the appeal in this matter. (Exhibit "A")

2. On July 16, 1991 the Trial Court granted Appellant's request to proceed in forma pauperis but specifically denied Appellant's request for a trial transcript at the expense of the United States. (Exhibit "B")

3. Appellant still is not in a financial position to secure the trial transcript; however, Appellant has a clear recollection of the testimony and can construct a Statement of Evidence.

4. The City does not dispute the facts as Evans presents them and in fact, states "The Appellee basically accepts

the recitation of the statement of facts as provided in Appellant's Opening Brief"; therefore, Evans does not anticipate any difficulties in preparing an agreed Statement of the Evidence.

5. That by the City's own admission, it does not question the accurateness of Evans recitation of the events at trial (Appellee Brief, p. 2); but instead takes the position that Evans cannot pursue his claim because no transcript of same is before this Court; and even admits that <u>under the facts of this case</u>, The City is responsible for the acts of its employees and it commission. (Emphasis Ours) (Appellee Brief, p. 9).

6. That Appellee, City of Tulsa, has moved this Court to dismiss his appeal for failure to provide a

transcript and for failure of proof in the record. Because Appellant is financially unable to pay the costs associated with the trial transcript, same is unavailable to him.

7. Evans respectfully submits that his case in meritorious and urges that justice, fairness and equity would not permit dismissal of this case.

WHEREFORE, Appellant respectfully requests leave of this Court to prepare a Statement on the Evidence or Proceedings pursuant to Rule 10 Fed.R.App.P. for reason that a transcript is unavailable. Appellant further requests that he be allowed to respond to Appellee's Opening

Brief after said Statement of the Evidence is filed with this Court and the Trial Court.

Respectfully submitted,

_____

Eddie Evans, Appellant Pro Se
1155 North Xenophon
Tulsa, OK 74127
(918) 585-1477

CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of November, 1991, a true and correct copy of the above and foregoing Motion was mailed, postage prepaid, to the following:

Neil McNeill
City Attorney
Charles R. Fisher
Assistant City Attorney
200 Civic Center, Room 316
Tulsa, OK 74103
(918) 596-7717

_____

Eddie Evans, Appellant Pro Se

APPENDIX "G"

28 U.S.C. Section 753(f) provides: Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. He shall not charge a fee for any copy of a transcript delivered to the clerk for the records of the court. Fees for transcripts furnished in criminal proceedings to persons proceeding under the Criminal Justice Act (18 U.S.C. 3006A,) or in habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis, shall be paid by the United States out of moneys appropriated for those purposes. Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in

forma pauperis shall be paid by the United States out of money appropriated for the purpose if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal. Fees for transcripts furnished in other proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question). The reporter may require any party requesting a transcript to prepay the estimated fee in advance except as to transcripts that are to be paid for by the United States.